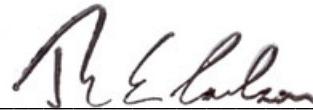




Signed and Filed: December 10, 2008


THOMAS E. CARLSON
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re) Case No. 05-33530 TEC
CHARLES MICHAEL COLLINS,) Chapter 7
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Debtor.)
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SECOND MEMORANDUM RE PAUL A. VANDER WAERDT'S MOTION TO REOPEN

Creditor Paul Vander Waerdt (Movant) seeks to reopen this chapter 7 case: (1) to "prosecute postpetition fraud claims against [Debtor] in the Superior Court", (2) for a determination that Debtor's conduct over a four-year period beginning prepetition is nondischargeable under 11 U.S.C. §§ 523 (a)(2), (4), and (6) , and (3) for revocation of Debtor's bankruptcy discharge for fraud. For the reasons stated below, the motion is denied. This memorandum constitutes the court's findings of facts and conclusions of law.

FACTS

In 2003, Movant engaged Debtor to represent him in several lawsuits. Movant alleges that, at the time of the engagement,

1 Debtor falsely stated that his malpractice insurance covered the
2 legal work subject to the engagement.

3 On October 20, 2004, Movant filed a complaint against Debtor
4 for professional negligence (San Francisco Sup. Court Case No. CGC
5 04-435626). On September 26, 2005, Debtor served discovery
6 responses in that action regarding his malpractice insurance.
7 Debtor agreed to produce relevant policy information, but allegedly
8 refused to produce any insurance policy.

9 On September 30, 2005, Debtor filed a no-asset chapter 7
10 petition. On October 5, 2005, notice of Debtor's bankruptcy case
11 and the deadline for filing nondischargeability actions (January 9,
12 2006) was served on Movant. On October 14, 2005, Debtor filed his
13 schedules of assets and liabilities. Debtor's Schedule F lists
14 Movant as a creditor with a contingent, unliquidated, disputed
15 claim for negligence and a contingent, disputed claim to vacate an
16 arbitration award entered prepetition in Debtor's favor. Movant
17 did not timely file an action seeking either to block entry of
18 Debtor's discharge under section 727 or to determine Movant's
19 claims excepted from discharge under section 523(a)(2), (4), or
20 (6).¹ Debtor's discharge was entered on January 12, 2006.

21 On November 20, 2008, Movant filed an adversary proceeding
22 against Debtor (Adv. Proc. No. 08-3146). The complaint seeks to
23 except Movant's claims from discharge pursuant to 11 U.S.C.
24 §§ 523(a)(3)(B), (a)(2), (a)(4), and (a)(6), based on Debtor's
25 alleged failure to disclose prior to January 2008 that Debtor was
26 not insured for legal malpractice regarding the matters in which

27
28 ¹ The deadline to file such an action was January 9, 2006.
Movant did not file the action until November 20, 2008.

1 Debtor represented Movant, and Debtor's alleged false statements to
2 Movant regarding the malpractice insurance policy. The complaint
3 alleges that it is timely filed under Federal Rule of Bankruptcy
4 Procedure 4007(b).

5 **DISCUSSION**

6 A bankruptcy case may be reopened "to administer assets, to
7 accord relief to the debtor, or for other cause." 11 U.S.C. § 350.
8 Because Movant's claims are time-barred, the motion to reopen is
9 denied.

10 Movant's claims under section 523 are time-barred because they
11 arose prepetition and because Movant was scheduled as a creditor in
12 this bankruptcy case and received timely notice of the deadline to
13 file a nondischargeability action. The claims arose prepetition,
14 because Movant could fairly contemplate such claims as of the date
15 Debtor filed his chapter 7 petition. Corman v. Morgan (In re
16 Morgan), 197 B.R. 892, 896-99 (N.D. Cal. 1996). Movant should have
17 contemplated that Debtor's insurance policy may not have covered
18 Movant's claims, because Debtor refused, prepetition, to produce
19 such policy in response to discovery.

20 Prepetition claims are subject to the bar date for filing an
21 action under section 523 (action to render claim nondischargeable)
22 or section 727 (action to deny Debtor's discharge). In this case,
23 such bar date was January 9, 2006. Movant received actual, timely
24 notice of that bar date and did not timely file an action under
25 section 523 or section 727. Accordingly, his claims under sections
26 523(a)(2), (a)(4), and (a)(6), and any claim to deny Debtor's
27 discharge based on his alleged failure to schedule his insurance
28 policy, are time barred. Fed. R. Bankr. Proc. 4004(a), 4007 (c).

1 Movant seeks to escape the deadline for filing an action to
2 determine nondischargeability by invoking section 523(a)(3)(B).
3 That section provides that an action to determine certain claims
4 for nondischargeability may be brought at any time by a creditor
5 who did not receive notice of the bankruptcy case. This avenue is
6 not available to Movant, because he was listed on Debtor's
7 schedules and served with notice of the bankruptcy case.

8 Likewise, Movant is time barred from filing an action to
9 revoke Debtor's discharge, even if it were obtained through fraud
10 not discovered until after entry of that discharge. 11 U.S.C.
11 §§ 727(d)(1), (e). The time for filing such an action is one year
12 from entry of the discharge and cannot be tolled. 11 U.S.C.
13 § 727(e); Fed. R. Bankr. Proc. 9024 ("a complaint to revoke
14 discharge in a chapter 7 liquidation case may be filed only within
15 the time allowed by § 727(e)); accord Towers v. Boyd (In re Boyd),
16 243 B.R. 756 (N.D. Cal. 2000) (Breyer, J.). This deadline passed
17 on January 9, 2007, well before Movant filed the current action.

18 Nor is it necessary to reopen the case to grant relief from
19 the automatic stay, because the stay is no longer in effect and has
20 been replaced by the discharge injunction. 11 U.S.C. §§ 362(c);
21 524.

22 Debtor has received a discharge of any personal liability with
23 respect to the claims asserted by Movant in the new adversary
24 proceeding and in the currently pending state-court action (Case
25 No. CGC 04-435626). 11 U.S.C. § 727(a). Movant may not bring
26 these claims in state court or in this court. Any continuation of
27 the state-court action to impose personal liability on Debtor on
28 account of these claims constitutes contempt of court for violating

1 the discharge injunction. E.g., Walls v. Wells Fargo Bank, N.A.,
2 276 F.3d 502, 507 (9th Cir. 2002).

3 The court will enter an order directing the Clerk to close the
4 bankruptcy case and dismiss the adversary proceeding with
5 prejudice.

6 ****END OF MEMORANDUM****

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1 **Court Service List**

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